In The

Supreme Court of the United States

79-296

_____Term, 1979

UNITED STATES SUPREME COURT NO. ____

FIFTH CIRCUIT COURT OF APPEALS NO. 77-5763

JACK EARL BARRENTINE, PAULINE CRENSHAW, LILLIE BELLE GRIGGS, BOBBY JOE LEE, BARBARA SINGLETON SMITH, DEAN RENE PETERS, WALTER RICHARD SMITH, JR., a/k/a Bobby Smith, OLIN WHITAKER, JR. a/k/a "Sugar Boy", and LUCILLE CLARK,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit (App. A, *infra*) was entered on March 22, 1979. A petition for rehearing with a suggestion for rehearing *en banc* was denied on

July 18, 1979 (App. B, *infra*). This petition is being filed within 30 days of the denial of a rehearing. The jurisdiction of this Court is involved under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Were the petitioners, Jack Earl Barrentine, Pauline Crenshaw, Lillie Belle Griggs, Bobby Joe Lee, Barbara Singleton Smith, Dean Rene Peters, Walter Richard Smith, Jr., Olin Whitaker, Jr. and Lucille Clark denied due process of law under the Fifth Amendment and effective assistance of counsel under the Sixth Amendment when the District Court denied their motion for a one week continuance in a complex conspiracy case so that the retained counsel of their choice, who was in trial in another federal district court could be present, and forced unprepared appointed counsel to go to trial only one-half hour after appointment?

2. Will the United States Supreme Court, under its general supervisory powers over the lower federal courts, reverse an appeal where the lower court based its decision outside the record before it?

3. Will a District Attorney's failure to obey a court order directing the District Attorney to furnish all defendants with the names of any unindicted co-conspirators require a new trial where an unindicted co-conspirator is the chief government witness at trial?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

On September 27, 1977, Jack Earl Barrentine, Pauline Crenshaw, Lillie Belle Griggs, Bobby Joe Lee, Dean Rene Peters, Walter Richard Smith, Jr., Barbara Singleton Smith, Olin Whitaker, Jr. and Lucille Clark were indicted by a Grand Jury in the Middle District of Alabama. The defendants did not learn of the charges until September 29, 1977 (R67, Vol. I). Walter Richard Smith immediately sought counsel for himself and his wife, Barbara Singleton Smith. He was referred to Edward Garland by other attorneys. In an affidavit accompanying a motion for continuance, Mr. Smith set out some of his reasons for wanting Mr. Garland to represent him and his wife (R67, Vol. I). His choice of counsel was predicated, in part, upon Mr. Garland's experience in similar cases (R66, 67, Vol. I). In addition, Mr. Smith felt confident of Mr. Garland's ability and believed that he needed an experienced attorney due to the indictment naming him as the target of the prosecution.

On October 1, 1977, Mr. Garland and Mr. Smith reached an agreement whereby the Smiths would be represented by Mr. Garland (R67, Vol. I).

On October 7, 1977, the defendants were arraigned. Mr. Garland appeared in behalf of the Smiths. No trial date was set at the arraignment. Within 10 days, Mr. Garland filed numerous motions in behalf of the Smiths. On the day the motions were filed, the Court ordered hearings on all motions on October 20, 1977. This order was signed on October 18, 1977, in Montgomery and mailed to counsel in Atlanta, requiring counsel to prepare for evidentiary hearings in Montgomery with such notice as was received by virtue of the arrival of the mail in Atlanta.

Also on October 18, 1977, the Court set the date of trial for October 31, 1977, in Opelika, Alabama. *All 18 defendants moved for continuances.* Mr. Garland argued numerous motions

in appellant's behalf, Mr. Garland informed the Court that he had a previously scheduled trial in the United States District Court in Atlanta on that date. He requested a continuance of *one week* until November 7, 1977, in order to eliminate the conflict (R197, Vol. II). The Court declined to do so and ordered Mr. Garland to "have somebody here if you can't be here." (R19, Vol. II). The Court was informed that Mr. and Mrs. Smith desired Mr. Garland and not someone substituting for him (R19, Vol. II). Mr. Garland urged the Court to call another case first and he would be able to proceed the following week, November 7, 1977 (R197, Vol. II).

During the argument of the motion for continuance to the week of November 7, 1977, the Court indicated that he would be leaving town in mid-trial on Wednesday, November 2, 1977, because he (and his wife) were attending a judicial seminar (R196, Vol. II). Therefore, the effect of Mr. Garland's motion was to request a continuance of two trial days. Each defendant made a formal request for continuance.

On Monday, October 31, 1977, in Opelika, Alabama, the case was called for trial. The undersigned counsel appeared and announced to the Court that Mr. Garland was on trial in the case of *The United States v. Cramer* (sic) and that the case would conclude "not later than Thursday." (R6, Vol. IV). The trial court then *appointed* the undersigned counsel as attorney for the Smiths (R7, Vol. IV).

Appointed counsel had met Mr. Smith once prior to October 31, 1977, and spoken with him for a period of 30 minutes (R8, 9, 10; Vol. IV). Counsel had never read the indictment that was the subject of the charges (R10, 21; Vol. IV). Counsel subsequently reaffirmed these facts "as an officer of the Court." (R152, Vol. IV). Mr. Smith objected to the Court's appointment (R7, Vol. IV). Counsel then asked for "some time to adequately prepare to represent him [Smith]." (R10, Vol. IV). The motion for continuance was renewed immediately after the jury was selected (R21, Vol. IV). All continuances were denied.

In the presence of the jury, the Assistant United States Attorney and all defense counsel made opening statements to the jury. Counsel for the Smiths was factually unprepared to make any opening statement, and did not do so, stating, in the presence of the jury, "I am unable to proceed at this time." (R40, Vol. IV).

At the conclusion of the first Government witness, counsel was unable to cross-examine the key figure in the case, the unindicted co-defendant, Bland (R71, Vol. IV). Counsel's request for advance *Jencks* material to assist his knowledge was denied (R73, Vol. IV).

Counsel's cross-examination of all witnesses was limited to a cursory review of the prior statements as contained in the *Jencks* materials. Counsel was unprepared to pursue the evidentiary matters relating to the motion to suppress which were reserved until trial (R104, 105, 106; Vol. II; R803-806, Vol. VI). On almost every occasion, counsel was unable to conduct meaningful cross-examination of the Government witnesses (R932, Vol. VI, as example). The defendant, Bobby Smith, urged the Court that he had a valid defense, but that counsel would not call witnesses without the opportunity of interviewing them prior to their testifying (R1151, 1152, 1153; Vol. VII). (Also see record under seal.) Mr. Smith, in camera, recited the names of witnesses he desired called and informed the Court in general terms of the substance of their testimony.

The Court granted a portion of a bill of particulars filed by defendants Mr. and Mrs. Smith, asking for the names of unindicted co-conspirators (R96, Vol. I). The Assistant United States Attorney denied having knowledge of any "unindicted co-conspirators" or his present intention to call any such person as a witness (R95, Vol. II).

Factual inaccuracies and materials outside the record were contained in both the Government's brief and the opinion of the

Fifth Circuit Court of Appeals. These facts are set out in defendants reasons for granting the writ of certiorari.

REASONS FOR GRANTING THE WRIT

No case will likely come before this Court which combines more aspects of the defendant's right to the *effective* assistance of counsel in a criminal case and which urges resolution of issues pertaining to the right to counsel more strongly than this case.

This argument will be in two parts.

I.

A. The trial court erred in failing to allow a continuance to allow retained counsel to be present and in appointing counsel when appellants were already represented by counsel of their choice.

Every person charged with a crime is entitled under the Sixth Amendment to the assistance of counsel for his defense. *Johnson v. Zerbst,* 304 U.S. 458, 463; 58 S. Ct. 1019. Implied in the right to counsel is the right to effective representation whether counsel is appointed or retained. *Powell v. Alabama,* 287 U.S. 45, 57 (1932); *Stokes v. Peyton,* 437 F.2d 131, 136 (4th Cir. 1970); *Moore v. United States,* 432 F.2d 720 (3d Cir. 1970); *United States v. Ash,* 413 U.S. 300 (1973); *United States v. Edwards,* 488 F.2d 1154, 1164 (5th Cir. 1974). In addition the right to counsel entails the right of the accused, if he can provide counsel for himself by his own resources, to be represented by any attorney of his own choosing. *United States v. Inman,* 483 F.2d 738 (4th Cir. 1978). Thus in *United States v. Johnson,* 318 F.2d 288 (6th Cir. 1963), the Court held that:

> "The Sixth Amendment does not concern itself with who the counsel may be or how the counsel may be selected. But if a defendant in a

> criminal case desires to hire his own counsel, in order that the object of the Sixth Amendment be met, such defendant must have fair opportunity and reasonable time to employ counsel of his own choosing."

See also Releford v. United States, 288 F.2d 298 (9th Cir. 1961); *Powell v. Alabama,* 287 U.S. 45, 53 (1932); *Crooker v. California,* 357 U.S. 433 (1958).

Petitioners recognize that the right to secure one's own legal representative cannot become arbitrary or obstructive of the judicial process. *Lee v. United States,* 235 F.2d 219 (D.C. Cir. 1972). This right to one's own counsel is, however, not to be ignored in favor of a desire to dispose of pending cases.

As this Court noted in *Ungar v. Sarafite,* 376 U.S. 575 (1964), where the right to counsel was asserted to conflict with the court's right to proceed with a trial in an orderly and timely fashion:

> "The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel . . . Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality . . . There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Id.,* p. 589.

This same requirement of taking into consideration all of the circumstances in determining whether a continuance should have been granted is expressed in lower federal court opinions such as *United States v. Bragan,* 499 F.2d 1376 (4th Cir. 1974) as well. In *Bragan,* the Court noted that "[W]hen these circumstances raise an issue about the defendant's right to counsel, the trial court must exercise its discretion, and the reviewing court must test its ruling by the precepts of the Sixth Amendment," citing *Ungar v. Sarafite, supra,* and *Franken v. United States,* 248 F.2d 789 (4th Cir. 1957).

Citing the language from the *Ungar* opinion quoted above, the Fifth Circuit recognized in *Gandy v. State of Alabama,* 569 F.2d 1318 (5th Cir. 1978) that viewing all the circumstances surrounding a trial court's decision, the denial of a continuance may be so arbitrary and so fundamentally unfair as to do violence to the constitutional principle of due process. The court then went on to note that:

> ". . . the right to counsel theme by the due process clause has at least four important variations: the right to have counsel, the right to a minimal quality of counsel, the right to a reasonable opportunity to select and be represented by chosen counsel, and the right to a preparation period sufficient to assure at least minimal quality of counsel." *Id.* at 1323.

The court then went on to hold that in determining the balance between the defendant's due process right to adequate representation by counsel of his choice and the general interest in the prompt and efficient administration, where the proper exercise of the trial court's discretion in denying a continuance is involved:

> "What is 'fair or reasonable opportunity' depends upon all the surrounding circumstances; some

> factors to be considered include: (1) the length of the requested delay; (2) whether the lead counsel has an associate who is adequately prepared to try the case; (3) whether other continuances have been requested and granted; (4) the balanced convenience or inconvenience to litigants, witnesses, opposing counsel, and the court; (5) whether the requested delay is for a legitimate reason; or whether it is dilatory and contrived; (6) whether there are other unique factors present." *See generally Giacalone v. Lucas*, 445 F.2d 1238 (6th Cir. 1971), *cert. denied*, 405 U.S. 922, 92 S. Ct. 960, 30 L. Ed. 2d 793 (1972). *Id.* at 1324.

The court thereby set out a standard for reviewing the exercise of trial court discretion in denying continuances.

In *Gandy*, the retained defense counsel was absent due to a *civil* proceeding in another court. The law partner of counsel appeared and urged for a continuance. He was factually unprepared, but ordered to proceed. The court discussed the issues involved and concluded that *Gandy* was denied necessary constitutional safeguards and reversed the State Court conviction.

The Court in *Gandy* noted that the proceedings [indistinguishable factually from our situation], were doubly violative of the defendants' rights. 569 F.2d at 1327. First, the Court observed that *Gandy* was impermissibly denied "*his right to choose his counsel,*" (Emphasis added), citing *Gomez v. Heard*, 218 F. Supp. 302, *aff.* 321 F.2d 88 (5th Cir. 1963) and *Argo v. Wiman*, 209 F. Supp. 299, *aff.* 308 F.2d 674 (5th Cir. 1962). Secondly, the Court concluded that, in the retained counsel's absence, *Gandy* was represented by another attorney who was unfamiliar with the case and such proceedings showed a *per se* ineffective assistance of counsel.

The present case involves a factual pattern almost identical to that in the *Gandy* case. The record shows that Mr. Garland was retained by petitioners three (3) days after the indictment was returned. At the time Mr. Garland was retained, the petitioner had not been arraigned. At arraignment *a trial date was not set.* On October 13, 1977, by letter, the Assistant United States Attorney informed counsel of his desire to try the case on October 31, 1977. At the hearing on motions on October 20, 1977, the Court announced the trial date 11 days hence. Mr. Garland informed the Court that he was already scheduled for a criminal trial which would be concluded in time to proceed on November 7, 1977, but not on October 31, 1977, and made a formal request for a continuance which was denied.

It is inherent in our system that both the courts and counsel will frequently have schedule conflicts. Certainly some attorneys carry schedules months in advance; however, such was not the case in the present matter. The Court gave counsel less than two weeks notice of the trial date. While the Sixth Amendment does not require the Court to set a case at the pleasure of either counsel or the accused, it does require the Court to be sensitive to the right of the defendant to have counsel of his choosing. Few, if any, trial attorneys would ever be able to appear on such notice as provided herein. No accused citizen would be able to find an experienced attorney on such short notice to competently represent him in such matters.

When Mr. Garland did not appear on the scheduled trial date, the District Court appointed his law partner, John Nuckolls, who was present to again request a continuance, on Mr. Garland's behalf, to represent the petitioners over their objections. Although Mr. Nuckolls was unprepared and virtually unfamiliar with the case, he was denied a continuance in which to prepare and was forced to go to trial one half hour from the time he was appointed. In affirming the subsequent conviction of the petitioners, the Court of Appeals for the Fifth Circuit did not analyze the trial court's denial of the continuances under the

standards which they had set out in *Gandy v. Alabama, supra.* Neither the Court of Appeals nor the trial court made any effort to apply any of the six factors set out in that opinion, although a consideration of those factors would have dictated a granting of the requested continuance: The length of the requested delay was very short, especially in light of the fact that the Court anticipated recessing trial for three days out of the week which would have comprised the continuance, leaving only a two trial day delay. There was no associate who was adequately prepared to try the case. Such a brief delay would have caused little inconvenience to litigants, witnesses, etc., in light of the short notice given with regard to the scheduled trial date. And, the requested delay was for a very legitimate reason.

Since the Fifth Circuit did not apply the *Gandy* factors to the present case, it can only be assumed that the Court has adopted a higher standard of review for state court actions insofar as requests for continuance are concerned, and has placed more emphasis on the assurance of effective assistance of counsel in cases involving state prisoners (as *Gandy* was) than in cases involving federal prisoners, an absurd proposition. A consideration of all the factors of a federal case should be undertaken, as urged by this Court in *Ungar v. Sarafite, supra,* to safeguard valuable Fifth and Sixth Amendment rights. Such consideration in this case would dictate that the balance between due process and Sixth Amendment rights to the effective assistance of the counsel of one's choice and the effective administration of the judicial process weighs heavily in favor of petitioners' constitutional rights and, thus, it was an abuse of discretion by the trial court to deny the continuance requested to assure Mr. Garland's presence.

Several circuits have faced factual situations similar to the present case and have found that the denial of continuances under those situations violated defendant's constitutional rights.

In *United States v. Johnson,* 318 F.2d 288 (6th Cir. 1963), the defendants retained attorney was absent "to *prepare* an important case in the Michigan Supreme Court". He requested that an associate handle the case. On the morning of trial, the defendant expressed his desire to have his retained counsel present. The trial court denied the request and the Circuit Court reversed the subsequent conviction. In its decision, the Court noted that the presence of retained counsel was necessary in order that the accused have a "full, fair trial under the law." *Johnson, supra,* at 291.

While a speedy trial is desirable, such a purpose can serve "no justification for subversion of the Sixth Amendment right to present an effective defense through counsel." *United States v. Mitchell,* 354 F.2d 767, 769 (2nd Cir. 1966). In *Mitchell,* the retained counsel for the defendants was ill on the day set for trial. The defendant had some difficulty "finding a counsel who I will have confidence will represent my position in opposition." The Court appointed counsel and proceeded with trial eight days later. The Second Circuit reversed the conviction saying that the defendant did not relinquish his right to retain counsel of his choosing, and the trial court erred in forcing the case to trial with appointed counsel. *Mitchell, supra* at 768.

In *United States v. McMann,* 386 F.2d 611 (2nd Cir. 1967), the Circuit Court again emphasized that the plight of one facing trial absent his retained counsel must be given sympathetic consideration. The Court noted that the defendant is entitled to hire his "champion" who is attuned to his interests. Where he is not given time for the appearance of his retained counsel, the Sixth Amendment is trampled. *McMann, supra,* at 620.

The trial judge's comments in this case indicated no concern for the fact that retained counsel had only a *limited schedule conflict.* He indicated that all attorneys had to abide by his calendar settings or else (R7, Vol. IV). This was apparently true regardless of the fact that counsel had no idea when the case

would be tried when he was first retained. If every trial judge were to adopt this position, the trial attorney's practice would come to an end. In his comments to the defendant, Bobby Smith, the Court stated that "you are not entitled to continue this case simply because Mr. Garland gets himself so involved that he can't be in this Court." (R8, Vol. IV). Subsequently, the Court stated that Mr. Garland accepted a group of cases which in my judgment he shouldn't have accepted . . .". (R1150, Vol. VII). There is absolutely no basis for such reasoning. When retained, Mr. Garland could not have known of the subsequent calendar setting. Immediately following the above comment, the Court recited the only apparent factor he considered. "My situation is I am the only criminal judge in this district who is involved; *I have to turn these cases out.*" (R1150, Vol. VII). Thus, the Sixth Amendment rights of the defendants were sacrificed in favor of a desire for case disposition.

B. Denial of appointed counsel's request for time to prepare a defense compounded the denial of effective assistance of counsel in petitioners' trial.

Having appointed counsel for appellants, the Court was under a duty to provide a reasonable time for counsel to defend against the charges. The errors urged herein are interrelated and the argument and citations urged in A. herein are equally applicable.

The Court appointed the undersigned as counsel on the Monday morning of the trial (R7, Vol. IV). He then ordered the trial to proceed "unless the U.S. Attorney has another suggestion". (R7, Vol. IV). Apparently, the Court was allowing the prosecuting attorney to make the decision in this regard. The appellant, Bobby Smith, objected to proceeding with appointed counsel, stating that he did not know counsel and had met him only once before (R7, Vol. IV). Counsel had not read the indictment (R10, Vol. IV). A request was made for time to prepare to defend the case (R10, Vol. IV). Counsel was given

until 10:00 o'clock a.m., that day, to prepare — a period of approximately 30 minutes (R11, Vol. IV). After the selection of the jury, counsel again requested a continuance (R21, Vol. IV). The Court denied any continuances and thereafter counsel engaged in an eight day trial involving nearly 200 exhibits (some containing multiple items) and 45 Government witnesses. The scope of the case covered several months in time and involved complex legal and factual issues.

The present concern with efficient judicial administration is not novel. In 1932, the United States Supreme Court noted that delay in enforcement of criminal law was one of the "evils of our times". *Powell v. Alabama,* 287 U.S. 45, 59. At the same time, the Court in *Powell* did not hesitate to condemn conduct which placed judicial expediency above individual rights. "A defendant, charged with a serious crime, must not be stripped of *his right* to have sufficient time to advise with counsel and prepare his defense." *Powell, supra* at 59. The language of *Powell* has been repeated with regularity and stands without question as "bed rock" law. This principle of law is regularly applied to the present factual situation. *See Johnson v. Zerbst, supra* at 458; *Fay v. Noia,* 372 U.S. 391; *Lofton v. Procunier,* 487 F.2d 434 (6th Cir. 1973); *United States v. McMann,* 386 F.2d 611 (2d Cir. 1967); *United States v. Oliva,* 558 F.2d 1366 (10th Cir. 1977); *Gomez v. Heard, supra; Long v. State, supra; Davis v. State, supra.* In *United States v. McMann, supra,* the Circuit Court reversed a conviction where substitute counsel was given one hour to confer with his client and proceed with the defense.

In *United States v. Miller,* 508 F.2d 444 (7th Cir. 1974), a motion for continuance was presented one day after appointment of counsel and one day prior to trial. In finding ineffective assistance of counsel, and abuse of trial court discretion, the Court remarked:

> "We fail to see how counsel could have been expected to seek discovery, prepare jury

> instructions, interview prospective witnesses, research law, prepare his opening statement, and summation, interview his client and perform the numerous other tasks and duties necessary to insure adequate representation by counsel." *Id.* at 451.

The Court went on to quote the following statement from *Avery v. Alabama,* 308 U.S. 444, 446 (1940):

> "But the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment."

The representation of petitioners by the undersigned John Nuckolls constituted only such formal compliance with the requirement of the right to counsel. He had only one-half hour to familiarize himself with his "clients" as well as the factual and legal issues in a major complex conspiracy gambling case in which the indictment alone consisted of fifteen legal size pages and involved 54 overt acts, spanning a wide time period and involving almost 50 witnesses.

The record shows that the appellants, in addition to having a factual defense, had potentially fruitful areas of cross-examination which required investigation and presentation. These were matters which were brought to the Court's attention in open court and *in camera.* Counsel informed the Court of the existence of "a good defense which needs to be prepared". (R1151, Vol. VII). Mr. Smith complained that counsel would not call witnesses in his defense because he had been unable to

interview them (R1151, Vol. VII). Finally, even the Court recognized the unfairness of the situation as it affected appellants (R1152, Vol. VII).

In *MacKenna v. Ellis,* 280 F.2d 592 (5th Cir. 1960), the Court interpreted the right to counsel as:

> ". . .the right to effective counsel. We interpret counsel to mean not errorless counsel and not counsel judged ineffective by hindsight, but counsel *likely to render* and rendering reasonably effective assistance."

The earlier "farce-mockery" standard has been reconciled with the *MacKenna* standard. As stated in *United States v. Edwards,* 488 F.2d 1154, 1164 (6th Cir. 1974):

> "One may receive ineffective assistance of counsel even though the proceedings have not been a farce or mockery."

A proper standard or test takes into consideration practical and realistic factors. As explained in *United States v. DeCoster,* 487 F.2d 1197 (D.C. Cir. 1973) at p. 1204:

> "Proof of prejudice may well be absent from the record *precisely because counsel has been ineffective.* For example, when counsel failed to conduct an investigation, the record may not indicate which witnesses he could have called or defenses he could have raised."

Obviously, an experienced attorney can usually give an appearance of reasonable competency when his conduct is viewed from a barren record. Such an *appearance* of competency is insufficient when the proper tests are applied. In *Moore v. United States,* 432 F.2d 730 (3rd Cir. 1970), the Court noted:

> "We have no doubt that counsel acted in an efficient manner as far as the trial judge was able to observe his conduct. But [legal] representation involves more than courtroom conduct of an advocate. The exercise of the utmost skill during trial is not enough if counsel neglected the necessary investigation and preparation of the case or failed to interview essential witnesses or to arrange their attendance."

Thus, the trial court must insure that defendants are afforded "conscientious" protection of their interests. *See Beasley v. United States,* 291 F.2d 687 (6th Cir. 1974). Preparation of available defenses is necessary to "preserve the adversary process." *United States v. Ash,* 413 U.S. 300 (1973).

Although it is urged that the facts presented herein rise to the "incompetency level", the Court in *Gandy, supra,* indicated that one does not have to rely upon ineffective assistance standards. In *Gandy,* the Fifth Circuit noted that:

> "It is of no relevance that substitute counsel has not been shown to have performed incompetently or ineptly. The claimed deprivation is an arbitrary encroachment upon the right of counsel of choice and not a claim of ineffective assistance rendered in the performance by the substitute counsel." 569 F.2d at 1326.

If the Court reviews the record regarding counsel's effectiveness, it will conclude that the proceedings were but an empty formality proceeding to a pre-determined end due to substitute counsel's factual unfamiliarity and lack of preparation time.

In *United States v. Fisher,* 477 F.2d 300 (4th Cir. 1973), in finding the denial of a motion for continuance to be an abuse of discretion, the Court stated:

> "We also reaffirm that judges are empowered to insist that counsel be prepared so that trials may be held as scheduled and that trial courts do not lack authority to censure attorneys for dilatory tactics. . . . But conviction without effective legal representation is a misplaced sanction for the shortcomings of a defendant's attorneys." *Id.* at 304.

At no time was there any suggestion that the appellants Bobby Smith and Barbara Smith were trifling with the Court, or attempting to use the absence of Mr. Garland as a tactic to obtain unwarranted delay or to evade justice. In fact, the Court commented, "I think Mr. Smith did the best he could." (R5, Vol. III). As in *Gandy* and *Fisher,* it follows in the present case that if the trial court determined that retained counsel had been guilty of a breach of his duty, such conduct by counsel did not direct itself to forcing the accused on trial with appointed counsel. In the present case, the Court held that retained counsel's *temporary* presence in another United States District Court engaged in trying a criminal case was not an "adequate excuse for his lawyer not to be here." (R1153, Vol. IV). This reasoning, in light of the short delay required, suggests that case disposition rather than justice was the primary consideration of the trial court.

The conflicts herein involving the defendants' right to counsel were largely the result of the "myopic insistence upon expeditiousness" in the fact of a reasonable request for a brief delay. *See Gandy, supra,* at 1322. While counsel does not urge that the Court's schedule is not important, a dogmatic insistence on an arbitrary court date is neither realistic nor consistent with the inalienable rights and constitutional freedoms we believe in.

The pressures of expanding court calendars and the Speedy Trial Act may cause difficulty with the administration of the courts; however, an insensitive concern for swift "justice"

contributes to the decline in competency of counsel and reduces the quality of justice and ultimately erodes the Sixth Amendment. While the Government is free to spend months and years in investigation, the accused may have only a brief time to confront the charges. Where courts deny (as here) witness lists, advance *Jencks* materials, any meaningful bill of particulars, and discovery, even expert counsel can be incompetent. The issue is compounded when subsitute counsel is ordered to trial without adequate preparation time.

This Court held in *Hawk v. Olson*, 326 U.S. 271, 276 (1945) that the Fourteenth Amendment is violated when a defendant is forced to trial in such a way as to deprive him of the effective assistance of counsel. Petitioners contend that the denial by the District Court of Mr. Garland's and Mr. Nuckolls' requests for continuance and the appointment of Mr. Nuckolls against petitioners' will when they were already represented by counsel of their choice operated both independently and in combination to deprive them of their due process and Sixth Amendment rights to the effective assistance of counsel in this case. However, no clear standard has been enunciated by the federal courts for balancing a criminal defendant's right to counsel in such a situation against the need for an orderly and efficient judicial process. This case presents an ideal opportunity for this Court to clear up the confusion and uncertainty existing among the lower federal courts on this issue and to establish some guidelines by which the balancing should be governed so that the right to counsel does not vary from circuit to circuit and case to case.

II.

Will the United States Supreme Court, under its general supervisory powers over the lower federal courts, reverse an appeal where the lower court based its decision outside the record before it?

It is well settled that the Supreme Court has supervisory authority over lower federal courts. In *McNabb v. United States*, 318 U.S. 332, 340 (1943), the Court addressed itself not only to this supervisory authority, but to its scope as well. There the Court said, "the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure."

The Court in *McNabb* went further to state that "such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as due process of law."

In a concurring opinion in *Sherman v. United States*, 356 U.S. 369, 380 (1958), four justices set forth further standards. "Insofar as they are used as instrumentalities in the administration of criminal justice, the federal courts have an *obligation* to set their face against enforcement of the law by lawless means or means that violate rationally undictated standards of justice and to refuse to sustain such methods by effectuating them."

Thus it is clear that the appellate courts have a duty to exercise their supervisory authority over inferior courts in order to maintain "civilized standards of procedure and evidence." The reason is clear, as the Court indicated in *Sherman, supra.*

"Public confidence in the fair and honorable administration of justice upon which ultimately depends the rule of law is the transcending value at stake."

Such language as to the rationale behind supervisory authority indicates that supervisory control must be viewed as a continuing obligation. For the most part, supervisory authority involves a federal circuit court of appeals reviewing procedures and methods adopted by a United States District Court. However, when the procedures and methods in question are adopted by a circuit court of appeals, as is the case here, it becomes the obligation of the Supreme Court to exercise its supervisory authority, in order to insure that the standards set forth in *McNabb* and *Sherman* are lived up to.

It is well settled that circuit courts of appeal are not courts of original jurisdiction and that their function relates to review of matters in the inferior courts. The proper method and procedure to adopt in considering what may be reviewed was set out in *United States ex rel. Bradshaw v. Aldridge*, 432 F.2d 1248, 1250 (3d Cir. 1970). There the Court stated that "it is, of course, black letter law that a United States court of appeals may not consider material or purported evidence which was not brought upon the record in the trial court."

The Fifth Circuit in *Garcia v. American Marine Corporation*, 432 F.2d 6, 8 (5th Cir. 1970) adopted a similar rule when they stated that "it is fundamental that facts not presented at trial may not be asserted on appeal." The Second Circuit also agreed stating in *International Business Machines Corp. v. Edelstein*, 526 F.2d 37, 45 (2d Cir. 1975) that "the appellate court will not speculate about the proceeding below, but will rely only upon the record actually made."

The opinion from this case, however, shows that that Court did not limit themselves to the record, in order to find sufficient reason to sustain the conviction, after the appellants had gone

forward with their appeal. On page 1072 of the opinion (which is published at 591 F.2d 1069 (5th Cir. 1979)), the Court notes that the "Smiths first became aware of the pending investigation . . ." The paragraph in regard to this which follows is wholly outside the record. The next paragraph, beginning with "During the month of July, 1977," involves evidence wholly outside the record.

The next paragraph which states that "On October 12, 1977, the Smiths and Garland were notified that the trial was set for October 31, 1977," is incorrect. Actually the first formal notice the appellants had was an order dated October 18, 1977, and signed by the trial judge wherein he set the case down for trial.

On page 1074 of the opinion, the Court states that "In this case there were eighteen defendants, sixteen of whom were ready to proceed when the continuance was requested." This is totally inaccurate fabrication, as is pointed out by the appeal of Michael Garner, counsel for Barrentine, Crenshaw, Griggs, Lee and Peters. In that appeal, counsel raised only one issue: Whether or not the trial court had abused its discretion by failing to grant a continuance both prior to trial and at the time of trial.

On page 1077 of the opinion, the Court states that "Appellants attempted to make the requisite showing of specific prejudice. In the Smiths' reply brief they urge that *Bursey v. Weatherford* . . . recognizes as prejudicial the denial of the opportunity." This statement is incorrect. Again, a total fabrication. The appellants did not file a reply brief, and at no time did they ever cite this case. No doubt, this was a mistake on the part of the Court. Nonetheless, the Court has adopted a practice of grossly misreading the trial record and of considering on appeal matters not contained in the record.

On page 1073 in footnote seven, the Court notes in regard to attorney John Nuckolls, that "Before trial even began he demonstrated impressive familiarity with at least some of the

details of the case." See note 9, *infra*. Note 9, however, involves Attorney Garner's request for a continuance. Mr. Nuckolls had nothing to do with that conversation, yet by use of footnote 7, the Court implies that Nuckolls was not candid with the trial court insofar as his lack of preparation was concerned.

It is also of interest to note that the Government's brief contains factual inaccuracies and materials outside the record. This is significant because said inaccuracies and materials are contained in the Court's opinion. The Government's brief at page 5, beginning with the sentence, "Certain gambling paraphernalia was located in the search," was completely outside the record. All of page six of the Government's brief is also outside the record. The last paragraph on page 7 is completely outside the record. On page 8 of the Government's brief, the statement indicating as to when the appellants were notified is untrue, the record reflecting that the first formal notice of a trial date was on October 18, 1977. Also, pages 17 and 32 of the Government's brief are either inaccurate or totally outside the record.

Is this insistence on going outside the record in order to write an opinion such activity that would justify the Court in granting a writ of certiorari in order that the Court should exercise its supervisory authority? There can be no doubt. As we have already noted, supervisory authority is granted so that civilized standards of procedure can be established and so that "rationally vindicated standards of justice" have prevailed. When these standards are abandoned, the Appellate Court has a duty and obligation to exercise its authority.

By failing to rule on the practices adopted by the Court in the opinion, the Court will in effect recognize them as valid. To do so would be to make a mockery of supervisory authority. It would also indicate to other lower appellate courts that they are free to go outside the record in writing their opinions. Such a procedure cannot in any way be said to "judicial supervision of

the administration of criminal justice" and it is therefore incumbent upon the Court to grant certiorari so that the concept of supervisory authority remains viable.

III.

Will a District Attorney's failure to obey a court order directing the District Attorney to furnish all defendants with the names of any unindicted co-conspirators require a new trial where an unindicted co-conspirator is the chief Government witness at trial?

The Court's analysis of this issue begins on page 1075 of the opinion. The Court conceded that the Smiths had (a) a right to a bill of particulars, (b) a right to the name or names of any co-conspirators, (c) that the trial court ordered the Government to give the defendants the names of the co-conspirators, if any in fact existed, (d) that Charles "Dusty" Bland was a co-conspirator, and finally (e) the Government failed and refused to furnish defendants with Bland's name.

It is respectfully contended that after this analysis, the Court then shies away from reversing this case by shifting the argument from governmental misconduct to failure to abide discovery orders.

Bills of particular are not discovery devices and are not to be used as discovery devices. *United States v. Grieco*, 25 F.R.D. 58, 61. Even if we treat the bill of particulars as a discovery device, the Court has misconstrued the law in the present case. *See United States v. Opager*, 589 F.2d 799 (5th Cir. 1979).

The Court of Appeals quite rightly says that substantial prejudice must be shown when the Government does not obey a discovery order, quoting *United States v. James*, 495 F.2d 434 (5th Cir. 1974).

The opinion seems to place a burden upon petitioners to make a showing post-trial that the Government's failure to obey the order resulted in prejudice to the defendants. The opinion defines prejudice as the discovery of impeaching or other type evidence which would benefit the defendants, and, further, that a failure to show this specific prejudice will not require a reversal.

The above argument cannot stand. *See United States v. Opager*, 589 F.2d 799 (5th Cir. 1979). The statement contained in the opinion quoting *Opager, supra,* saying that the *Opager* standard is "failure to obey an order, coupled with prejudice, is reversible error" misconstrues what the *Opager* Court meant when it said that if the witness' testimony *itself* was harmful, then prejudice is shown.

If we substitute the word co-conspirator (our case) for informant (the *Opager* opinion), we see that both our facts and *Opager, supra,* are almost squarely on all fours, and further that the *Opager* opinion effectively refutes the Court's reasoning when it affirmed this case.

To illustrate:

(1) The failure to comply with the Court's order denied defendants an opportunity to prepare a full defense (*Opager* at 804);

(2) Interviewing witnesses is extremely important (*Opager* at 804);

(3) Both Bland here and the witnesses' statements in *Opager* were extremely damaging (*Opager* at 804);

(4) The interviews may very well have helped the defense, at *least they would have had a chance* (*Opager* at 804);

(5) Even if no interview occurred, the withheld information may have been used to impeach (*Opager* at 804);

(6) Whether the witness wished to be interviewed is irrelevant (*Opager* at 805);

(7) The burden is on the Government (*Opager* at 804-5);

(8) The fact that the defendants and the witness knew each other in no way mitigates the harm done (*Opager* at 805);

(9) The refusal to obey affronted the Court and *prejudiced* the defendant (*Opager* at 805);

(10) The failure to comply cannot be excused by saying or showing that after all, it does not matter (*Opager* at 804-5); and

(11) The fact that the witness could be interviewed at trial does not excuse non-compliance (*Opager* at 804-5).

There is an uncanny resemblance between the Government's argument in *Opager, supra,* and the Court's arguments in our case. In *Opager, supra,* the Court rejected the Government's arguments, while in our case the Court embraced them.

The crucial misstep is the idea of prejudice. None of the petitioners could have been convicted without Bland's testimony. The evidence might be overwhelming, but it is only overwhelming because of Bland's testimony. *Opager* teaches us that this is the type of prejudice that is meant when it says reversal comes where non-disclosure is coupled with prejudice. It is the *testimony* that is *prejudicial, not* the circumstances that lead up to testimony as in conventional discovery orders.

If Bland had testified that he only knew the petitioners slightly and had not observed them in any illegal activity, then even though he was a co-conspirator, and even though the Government had been ordered to disclose and had failed to do so, the Appellate Court would not reverse under *Opager, supra,* because the *testimony* of the witness *had not been prejudicial* (i.e. harmful).

In the present case, the Circuit Court seemed to feel that defendants were under a duty to find and disclose (post-trial) information which would have discredited Bland and a failure to do so shows no prejudice. Disregarding the fact that the defendants were sentenced immediately and the appeal followed, this interpretation simply misreads *Opager, supra.*

The Government was ordered to disclose; they failed to do so; Bland's testimony was the heart of the Government's case and prejudiced defendants; and, therefore, a reversal was demanded.

At the very least, the Court should have continued the case to give counsel for all parties an opportunity to investigate Bland.

One last thing: The opinion in this case seems to be saying that if no prejudice is shown in the trial transcript (failure to impeach, etc.), then no prejudice is shown. *Opager* explicitly *rejects* this doctrine.

CONCLUSION

For the within and foregoing reasons, petitioners respectfully urge this Court to grant the writ of certiorari to the United States Court of Appeals for the Fifth Circuit and reverse the affirmation of their convictions.

GARLAND, NUCKOLLS & KADISH, P.C.

s/ John Nuckolls
JOHN A. NUCKOLLS

1012 Candler Building
Atlanta, Georgia 30303
Telephone: (404) 577-2225

CERTIFICATE OF SERVICE

This is to certify that I have this day served the Attorney General, United States Department of Justice, Washington D.C., with a copy of the within and foregoing petition for writ of certiorari by depositing same in the United States mail with sufficient postage thereon to assure delivery.

This 15th day of August, 1979.

s/ John Nuckolls
JOHN A. NUCKOLLS

APPENDIX A — OPINION OF THE FIFTH CIRCUIT COURT OF APPEALS RENDERED MARCH 22, 1979

UNITED STATES of America,

Plaintiff-Appellee,

v.

Jack Earl BARRENTINE, Pauline Crenshaw, Lillie Belle Griggs, Bobby Joe Lee, Olin Whitaker, Jr., a/k/a "Sugar Boy," Lucille Clark, Barbara Singleton Smith, Dean Rene Peters, Walter Richard Smith, Jr., a/k/a Bobby Smith, Dora Thomas,

Defendants-Appellants.

No. 77-5763.

United States Court of Appeals,
Fifth Circuit.

March 22, 1979.

Defendants were convicted before the United States District Court for the Middle District of Alabama, Robert E. Varner, J., of conspiring to transport gambling paraphernalia in interstate commerce and to conduct an illegal gambling business and of operating an illegal gambling business, with one defendant also being convicted of transporting gambling paraphernalia in interstate commerce, and defendants appealed. The Court of Appeals, Vance, Circuit Judge, held that: (1) refusal to grant continuance so that retained counsel of defendants' choice could be present during trial was not abuse of discretion; (2) Government's failure to identify informant as an unindicted coconspirator was not prejudicial; (3) where defense counsel cross-examined informant as to prior arrests in Texas it was not error to permit redirect testimony that informant had gone to

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Texas to pick up marijuana at one defendant's direction and (4) investigative reports kept in ordinary course of business were admissible under business record rule to establish that arrests resulted from defendants' complaints.

Affirmed.

1. Criminal Law ⚷ 586, 1151

Disposition of motions for continuance is vested in the sound discretion of the trial court; its ruling will not be disturbed on appeal, except upon a clear showing of abuse of discretion.

2. Criminal Law ⚷ 1151

Unless Court of Appeals concluded that district court's refusal to grant continuance because of absence of retained counsel was an unreasonable resolution of the various factors confronting the court, the trial court's ruling was to be upheld, even though it might be considered a harsh one.

3. Criminal Law ⚷ 593

Refusal to grant continuance so that retained counsel of defendants' choice could be present at trial was not abuse of discretion where 19 days prior to scheduled trial date defendants were aware that such setting conflicted with counsel's schedule, defendants were present some 11 days before trial date when trial court unequivocally stated that trial would go forward with or without such counsel and other qualified attorneys were then available to assume the defense case involved 18 defendants, 16 of whom were ready to proceed when continuance was requested on scheduled trial dated and 47 witnesses were ready and there were few, if any conflicts in the defenses. U.S.C.A. Const. Amend. 6.

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4. Indictment and Information ⚷ 121.4

Where indictment covered period from first day of February, 1976, to June 16, 1977, and informant testified that he entered conspiracy in 1975 and did not claim that he stopped working for gambling operation until January, 1977, and did not become an informant until April, 1977, the informant, who was not indicted, was an indicted coconspirator for purpose of motion for bill of particulars seeking names of all unindicted coconspirators; withdrawal did not alter informant's status as a conspirator during period which predated his withdrawal.

5. Indictment and Information ⚷ 121.1(3)

Granting of a bill of particulars is within the trial judge's discretion.

6. Indictment and Information ⚷ 121.1(6)

A bill of particulars is a proper procedure for discovering the names of unindicted coconspirators who the government plans to use as witnesses.

7. Criminal Law ⚷ 1166(1)

Prejudice to substantial rights of defendant is required before a conviction may be reversed for alleged errors in the administration of discovery.

8. Criminal Law ⚷ 1167(1)

Government's failure, in responding to motion for bill of particulars, to disclose name of informant as an unindicted coconspirator did not require reversal on ground that defendants, who were not informed until morning of trial that such informant would be a government witness, had inadequate

time to prepare for cross-examination where informant had been a high-level participant in the gambling operation but his name was absent from list of indictees and after his status was revealed but, before trial, Government disclosed information it possessed relative to charges against him and defense counsel was given opportunity to investigate further with help of assistant prosecutor.

9. Criminal Law ⟨⟩ 1166(8)

Defendants, complaining that at time of trial they believed that a deal had been made between Government and an informant who was an unindicted coconspirator, were not prejudiced because their motion for continuance was denied where both the Government and informant unequivocally denied having made any deal or even having had any discussions on the subject and no contrary evidence was brought forth and, furthermore, defendants failed to show that had a continuance been granted they would have been able to discover any probative evidence to the contrary.

10. Witnesses ⟨⟩ 372(2)

Defense counsel's cross-examination of star government witness as to prior arrests, to show possible bias, was proper.

11. Witnesses ⟨⟩ 372(1)

In case of a star witness or where the witness was an accomplice or participant in the crime for which defendant is being prosecuted, the importance of full cross-examination to disclose possible bias is necessarily increased.

12. Witnesses ⟨⟩ 287(4)

Cross-examination on a part of a transaction enables the opposing party to elicit evidence on redirect examination of the

whole transaction at least to the extent that it relates to the same transaction.

13. Witnesses ⟨⟩ 287(4)

Where defense counsel cross-examined star government witness concerning prior arrests and reason for his decision to talk to FBI, such examination opened the door to redirect testimony that witness had been arrested when he had gone to pick up marijuana at one defendant's request and that reason he talked to government agents was because of such defendant's involvement with his wife; furthermore, at pretrial hearing defense counsel was warned that if he inquired as to the arrests the prosecutor would bring out the challenged testimony on redirect.

14. Criminal Law ⟨⟩ 436, 1169.1(10)

Where defense counsel cross-examined principal government witness as to prior arrests, receipt of Georgia Bureau of Investigation file on burglary investigation involving witness and Harris County sheriff's department file covering investigation of another burglary committed by witness were admissible, under business record exception to hearsay rule, to establish that the arrests inquired into on cross-examination resulted from complaints or statements made by defendants themselves; reports were business records kept in ordinary course of business and even if their receipt was error the error was harmless in view of overwhelming evidence of guilt.

15. Criminal Law ⟨⟩ 1144.13(3), 1159.2(5)

On challenge to sufficiency of the evidence the Court of Appeals views the evidence in the light most favorable to the government; the guilty verdict must stand if it is supported by

substantial evidence taking the view most favorable to the government, without weighing conflicting evidence or testing the credibility of witnesses, and allowing all reasonable inferences from the evidence in favor of the verdict.

16. Conspiracy ⚷ 47(1)

While no formal agreement or direct evidence is necessary to establish a conspiracy, there must be proof beyond a reasonable doubt that the conspiracy existed, that the accused knew it existed and that with such knowledge the accused voluntarily joined it. 18 U.S.C.A. §371.

17. Conspiracy ⚷ 47(2)

Participation in a criminal conspiracy may be shown by circumstantial evidence. 18 U.S.C.A. §371.

18. Conspiracy ⚷ 47(2)

Conspiracy is almost always a matter of inferences deduced from the acts of the accused. 18 U.S.C.A. §371.

19. Conspiracy ⚷ 47(1)

Whether the evidence of a conspiracy is direct or circumstantial, the test of sufficiency thereof is whether a reasonably minded jury could find the evidence inconsistent with every hypothesis of innocence. 18 U.S.C.A. §371.

20. Conspiracy ⚷ 47(7)

Evidence was sufficient to convict defendant of conspiring to transport gambling paraphernalia in interstate commerce and to conduct an illegal gambling business, in view of

circumstantial corroboration of informant government witness' testimony placing defendant at the pinnacle of the operation as a knowing participant. 18 U.S.C.A. §§371, 1953, 1955.

21. Criminal Law ⚷ 1177

Where defendant, convicted of conspiring to transport gambling paraphernalia in interstate commerce and to conduct an illegal gambling business and of substantive offense of operating an illegal gambling business was sentenced to concurrent probationary terms, the Court of Appeals, on affirming conspiracy convictions against challenge to sufficiency of the evidence, would not review conviction on the substantive offense since there would be no adverse consequences from application of the concurrent sentence doctrine. 18 U.S.C.A. §§371, 1953, 1955.

Michael E. Garner, Columbus, Ga. (Court-appointed), Clark retained for Peters (Court-appointed for Barrentine, Clark, Crenshaw, Griggs, Lee & Whitaker only).

John A. Nuckolls, Atlanta, Ga., for Barbara Singleton Smith, and Walter Richard Smith.

Barry E. Teague, U.S. Atty., D. Broward Segrest, Asst. U.S. Atty., Montgomery, Ala., for plaintiff-appellee.

Appeals from the United States District Court For the Middle District of Alabama.

Before MORGAN, RONEY and VANCE, Circuit Judges.

VANCE, Circuit Judge.

Appendix A

Eighteen individuals[1] were indicted on three counts in the Middle District of Alabama on September 27, 1977. The first count charged a conspiracy under 18 U.S.C. §371. It alleged that defendants conspired to transport gambling paraphernalia in interstate commerce in violation of 18 U.S.C. §1953 and to conduct an illegal gambling business in violation of 18 U.S.C. §1955. The second count charged defendants with operating an illegal gambling business in violation of 18 U.S.C. §1955. Count three charged defendants with transporting gambling paraphernalia in interstate commerce in violation of 18 U.S.C. §1953. Their trial commenced on October 31, 1977, and concluded on November 9, 1977. The jury returned the following verdicts: Walter Smith (also known as Bobby Smith), guilty of counts one, two, and three; Barbara Smith, guilty of counts one and two; Bobby Joe Lee, guilty of counts one, two, and three; Jack Earl Barrentine, guilty of counts one, two, and three; Dean Rene Peters, guilty of counts one, two and three; Lillie Belle Griggs, guilty of counts one and two; Pauline Crenshaw, guilty of counts one and two; Olin Whitaker, Jr., guilty of counts one and two; Lucille Clark, guilty of counts one and two; and Dora Thomas, guilty of counts one and two.[2] The defendants received varying sentences ranging from five years probation to four years imprisonment. In the case of each defendant the court ordered that sentences to imprisonment under multiple counts should run concurrently. In addition Walter Smith was fined $10,000 on each of the three counts for a total of $30,000. The ten defendants listed above filed notices of appeal on November 17, 1977.

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1. The following persons were indicted: Walter Richard Smith, Jr., Barbara Singleton Smith, Jack Earl Barrentine, Dean Rene Peters, Edna McCoy Hill, Lillie Belle Griggs, Pauline Crenshaw, Curtis Arrington, Emige Dozier, Willie Battle, Noah B. Frazier, R. B. Moore, Olin Whitaker, Jr., Lucille Clark, Dora Thomas, Katie Calhoun, Antonio McCoy, and Bobby Joe Lee.

2. The following persons were convicted but did not appeal: Antonio McCoy, Katie Calhoun, R. B. Moore, Noah B. Frazier, Willie Battle, Emige Dozier, Curtis Arrington, and Edna McCoy Hill.

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Walter and Barbara Smith present nine claims of error. Barrentine, Lee, Peters, Griggs, Crenshaw, Whitaker, and Clark present only three of the nine claims of error.[3] We have considered all nine claims and conclude that the appellants' convictions must be affirmed. We will discuss only those claims that present substantial questions.

I

Appellants, Barbara and Bobby Smith, complain that the trial court erred in failing to grant a continuance so that retained counsel of their choice could be present during trial.[4] They claim

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3. Walter and Barbara Smith were represented by retained counsel and filed a separate brief presenting nine claims of error. Bobby Joe Lee, Jack Earl Barrentine, Lillie Belle Griggs, and Pauline Crenshaw appealed in forma pauperis. One attorney was appointed as counsel for these four defendants. The same counsel represented Dean Rene Peters on appeal. He filed a brief on behalf of all five claiming only that a continuance was improperly denied. Peters' notice of appeal had been filed by another, retained counsel. By motion, appointed counsel adopted two of the Smiths' claims of error on behalf of Lee Barrentine, Griggs, Crenshaw, and Peters. Olin Whitaker, Jr., and Lucille Clark were granted in forma pauperis status and were given the same appointed counsel as the above appellants. By separate motion, appointed counsel adopted these three claims of error on behalf of Whitaker and Clark. Dora Thomas apparently was granted in forma pauperis status and had the same counsel appointed to represent her, but no claims of error were presented to this court on her behalf.

4. In connection with this general complaint, the Smiths urge that their sixth amendment rights were violated in the following four respects: (1) the trial court erred in failing to allow a continuance to allow retained counsel to be present, (2) the trial court erred in appointing counsel when appellants were already represented by counsel, (3) the trial court erred in failing to grant appointed counsel's request for time to prepare a defense, (4) appellants were denied effective assistance of counsel due to the factual incompetency of appointed counsel. These four claims are interrelated and do not require separate treatment in light of our holding that the Smiths' sixth amendment rights were not violated.

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that this error violated their sixth amendment rights.[5] The United States maintains that the trial court did not abuse its discretion, particularly in view of the trial judge's warning to the Smiths that he would not continue the trial to resolve a conflict in the schedule of their newly retained counsel, Edward T.M. Garland, Esq.

The Smiths first became aware of the pending investigation and the likelihood of an indictment against them on June 16, 1977, when the government conducted a raid by executing several search warrants in Phenix City, Alabama, and Columbus, Georgia. One of the search warrants was executed by a search of the Smiths' residence. Almost immediately Bobby Smith engaged his usual attorney, Frank K. Martin, Esq., to represent him.

During the month of July 1977 Mr. Martin had a conversation with the United States Attorney regarding Bobby Smith and a possible deal, which would avoid his indictment. Mr. Martin was advised before the grand jury met, however, that there would be no plea bargain and that the United States would seek an indictment.

On September 27, 1977, the appellants were indicted. The Smiths were informed of the indictment on September 29. They appeared initially on October 3, 1977, before a United States magistrate and were released on bond. On Mr. Martin's recommendation the Smiths retained Garland on October 1, 1977. Garland appeared on behalf of the Smiths at the arraignment on October 7, 1977.

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5. The sixth amendment guarantees,

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

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On October 12, 1977, the Smiths and Garland were notified that trial was set for October 31, 1977. By that time both Garland and the Smiths were aware that the trial might conflict with another trial on Garland's schedule. On the same day Garland, together with the Smiths, prepared a motion for continuance and attached the affidavit of Bobby Smith requesting that only Garland represent him. This motion was filed on October 14, 1977, but was denied on October 18, 1977. On that day the court also ordered that other pending motions be heard on October 20, 1977.[6]

During this oral hearing Garland renewed his motion for continuance, and, in the presence of the Smiths, the following colloquy between the court and Garland occurred:

> MR. GARLAND: . . . Your Honor knows of my third ground which is the potential conflict, although the government's case over there is cracking a little bit and I may very well finish that in time to be present.
>
> THE COURT: I would hope so. You make arrangements to have someone here if you can't be here.
>
> MR. GARLAND: Your Honor, my client won't accept that.
>
> THE COURT: Well, I can't let your clients run my office and my calendar by selection of an attorney who is too busy to accept his case. Now, when you accept a case in my court you have a responsibility to my court to be here.

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6. Appellants filed seventeen different motions on which the district court conducted an extended hearing.

MR. GARLAND: Yes, sir, and we have a conflict in rights there I believe.

THE COURT: Well, you can decide your own conflicts, I am not going to decide it. But I will decide that your client can't have a conflict in his attorney's rights which will delay the action of this court.

MR. GARLAND: I understand, Your Honor. I am advising the client of his rights in that respect and I don't want—that issue hadn't been—I don't want to draw blood on that issue at this point.

THE COURT: Well, we will be ready to draw it whenever you are ready.

MR. GARLAND: Yes, Sir, it just doesn't seem like it is necessary yet.

The court and Garland discussed the situation again at the end of the hearing.

MR. GARLAND: Your Honor, speaking of again Monday, October 31. Would Your Honor consider beginning Nov. 7?

THE COURT: No, sir, my calendar is loaded. I couldn't fit this case in.

MR. GARLAND: . . . I, as you know, have a problem. The case I am in I think is going to end about Tuesday, November the 1st, and I want to be here and I want to try this case, but

with Your Honor going out of town, that's a problem; there isn't one case that can be slipped around to October 31 and let this one start November 7? I think I will be through.

THE COURT: There isn't because I am starting another docket in a different place, as I recall it, on the 7th.

We particularly note that the Smiths were present throughout these discussions and must have been fully aware of the court's position.

Apparently the Smiths did nothing to remedy their situation between October 20 and October 31, 1977, in spite of the court's clear statement of its position. On October 31, 1977, John A. Nuckolls, Esq., a member of Garland's firm, was present.[7] He advised the court that Garland was engaged in another trial and would not be available for the Smiths' trial.

As a result of this predicament the following discussion took place on October 31, 1977, the morning of the trial:

THE COURT: All right. Well, I told Mr. Garland when he was here last that it is the practice of this court that attorneys should not except [sic] retainers to practice in this court unless they plan to abide by the settings that this court makes, and Mr. Garland had an opportunity to do that. He was told that, he

7. Mr. Nuckolls said that he had not read the indictment and did not see how he could represent the Smiths. He did not represent that he was totally unprepared. On one occasion he had conferred with Mr. Smith in his office. Before trial even began he demonstrated impressive familiarity with at least some of the details of the case. See note 9, *infra*.

knew of my practice, and he is not here, and I am appointing you to represent Mr. and Mrs. Smith and we will go to trial unless the United States attorney has another suggestion.

MR. SMITH: Your Honor, may I address the Court, please?

THE COURT: Yes, sir.

MR. SMITH: Mr. Nuckolls, I do not even know him. I met him once before this morning. He is not familiar with my case. I have already retained Mr. Garland and it is my contention that the government says I am the one out of the whole bunch of conspiracy that they want the most; that was the reason I went to Mr. Garland, on referral from other attorneys. He has been well paid, I am sorry he is not here. I have no intention to try to delay this trial.

THE COURT: Mr. Smith, I am doing all of the criminal work for the Middle District of Alabama now. I cannot have lawyers set the terms of my court to suit themselves. I explained that to Mr. Garland, he accepted your money, he accepted your case on that basis, and for him to come in on the day of the trial when we have put everything else off to take care of your trial, is inexcusable, and the case will not be continued, we will go to trial. If Mr. Garland gets here he can participate, if he can't Mr. Nuckolls will represent you. You are entitled to a lawyer. You are entitled to have Mr. Garland acquaint his partner, or whomever may sit for him, with your

case, but you are not entitled to continue the case simply because Mr. Garland gets himself so involved that he can't be in this court.

MR. SMITH: Yes, thank you.

The disposition of motions for continuance is vested in the sound discretion of the trial court. Its ruling will not be disturbed on appeal, except upon a clear showing of abuse of its discretion. *Avery v. Alabama,* 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940); *United States v. Uptain,* 531 F.2d 1281 (5th Cir. 1976). Whether an abuse of discretion has occurred will be decided on a "case by case basis in light of the circumstances presented." *Id.* at 1285. In reaching a decision we examine the reasons for the continuance given at the time the request was denied. *Ungar v. Sarafite,* 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964); *McKinney v. Wainwright,* 488 F.2d 28 (5th Cir.), *cert. denied,* 416 U.S. 973, 94 S.Ct. 1998, 40 L.Ed.2d 562 (1974).

Several additional facts are pertinent to our consideration of the trial judge's exercise of discretion. In this case there were eighteen defendants, sixteen of whom were ready to proceed when the continuance was requested. The forty-seven witnesses used by the government had been subpoenaed and were then in court or were available to testify. Garland and Nuckolls are partners in a twelve-member, well-regarded Atlanta law firm that routinely handles criminal cases. They are of about the same age and experience. Smith is an experienced defendant who has had a long and close professional relationship with his regular attorney, Martin. Mrs. Smith has worked in the past as a receptionist in Martin's law office. The Smiths chose Garland because he was recommended by Martin. Martin represented Smith in the firearms case that also arose out of the June raid and is now pending in this court. There were few, if any,

conflicts in the interests of the defendants. Attorneys for the other defendants were prepared and vigorously attacked the government's case.

One aspect of the right to counsel enveloped in the due process clause is "the right to a reasonable opportunity to select and be represented by chosen counsel." *Gandy v. Alabama,* 569 F.2d 1318, 1323 (5th Cir. 1978). It is also clear, however, that "the right to counsel of one's choice is not absolute as is the right to the assistance of counsel." *Id.* at 1323.

The Smiths rely strongly on *Gandy v. Alabama, supra,* and that case would, indeed, support their argument but for a significant number of distinguishing facts. On the day set for trial, Gandy's retained counsel suddenly and abruptly abandoned him to handle a civil case in another county. The state trial judge then denied Gandy a continuance and required the retained counsel's totally unprepared partner to defend Gandy. The *Gandy* court stated,

> This is not a case in which the defendant was afforded an ample opportunity to secure counsel of his choice and attempted to manipulate the court's schedule by . . . selection of an unavailable attorney.

Gandy v. Alabama, supra, at 1328.

The case before us is markedly different. The trial court was faced with the extremely difficult task of managing a case with eighteen defendants and half-a-hundred witnesses. The Smiths were aware of the likelihood of their prosecution four and one-half months before trial. They knew of the conflict in Garland's schedule less than two weeks after they retained him. The manner in which Garland handled their case was inexcusably

unprofessional, but the Smiths are far from innocent in the matter. They were informed of the court's refusal of a continuance by its order of October 18, 1977. They were present on October 20, 1977, when the court unequivocally stated that the trial would go forward with or without Garland. Other qualified attorneys were then available to assume the Smiths' defense. The Smiths had no constitutional right to a new counsel of their choice who was unavailable, particularly in view of the problems inherent in a trial of this nature.

The record supports the inference that Garland and the Smiths made a calculated attempt to force a continuance notwithstanding their knowledge of the trial judge's strongly voiced contrary ruling. True to his calling, Smith gambled, but this time he lost.

Unless we conclude that the ruling of the district court was an unreasonable resolution of the various factors confronting it, we must uphold the lower court's ruling, even though it may be considered a harsh one. *United States v. Carroll,* 582 F.2d 942 (5th Cir. 1978). We have closely scrutinized the question. In light of our analysis of the critical events leading up to the motion, we find no abuse of discretion.

II

Charles Michael Bland was a member of the conspiracy, but he had become a government informant and therefore was not indicted. In their motion for a bill of particulars defense counsel sought the names of all unindicted coconspirators. The court granted this request. The government responded that there were none. All appellants contend that because Bland was an unindicted coconspirator the trial court erred in allowing him to testify. In the alternative, appellants contend that the trial court erred by not granting a continuance to allow defense counsel time to prepare for Bland's cross-examination. Their motion for

continuance on this ground was made after the court had denied appellants' motion to suppress Bland's testimony. As a related sub-issue appellants argue the Assistant United States Attorney's response to this inquiry constituted prosecutorial misconduct that was so prejudicial that a new trial is required.

In answer to these contentions and in justification of its conduct the government argues that Bland was not an unindicted coconspirator. It concedes that at one time he was a member of the conspiracy, but argues that he had effectively withdrawn from the conspiracy at the time of defendants' indictment. The United States relies on *United States v. Borelli*, 336 F.2d 376 (2nd Cir.), *cert. denied*, 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed.2d 555 (1964), in which the second circuit recognized that a conspirator can withdraw from the conspiracy if he takes affirmative steps to do so, and that making a clean breast to the authorities is affirmative action that can constitute such a withdrawal. In addition the government claims that its disclosure of Bland's identity would probably have resulted in his murder prior to trial.

With respect to Bland's safety we think it sufficient to state that the United States could have followed any of several permissible courses of action. The course it elected to follow was not among them. Its other contention fails because the government has attempted to make a broad extrapolation of a principle designed for defensive use by a defendant-coconspirator. Its purpose is not the circumvention of discovery. More important, perhaps, the argument is simply wrong as applied here. The indictment in this case covered the period from the first day of February 1976 through June 16, 1977. Bland testified that he entered the conspiracy in 1975. He does not claim that he stopped working for the operation until January 1977, and he did not become an FBI informant until April 1977. The government cites no authority to support an

argument that withdrawal from a conspiracy absolves a conspirator of all prewithdrawal guilt or alters his status as a conspirator during the period which predated his withdrawal. Such a position is untenable. If the government is asking that we extend *Borelli* to this end, we decline the invitation.

Our rejection of the government's argument, however, does not mean that the case must be reversed as a matter of course. To make that determination we look to complete circumstances in more detail.

Appellants' motion for bill of particulars sought the following information:

(9)

> Specify the names, addresses and telephone numbers of any un-indicted co-conspirators now known to the Government, but not named in the Indictment.

(28)

> State whether any defendant or co-conspirator has furnished, or has agreed to furnish, information to law enforcement authorities with respect to the alleged conspiracy or any of the charges contained in the Indictment.

The following colloquy, which took place during the hearing on the motion, is the basis of appellants' claim of error:

> THE COURT: Who he knows or expects to show had knowledge of the conspiracy. In other words, if they were conspirators under the legal

definition of conspirators, as Mr. Segrest sees it, I will require them to give you the name. But if he doesn't know they were conspirators he doesn't have to give you the name.

* * *

MR. SEGREST: It says specify the names, addresses and telephone numbers of any unindicted co-conspirators. We don't have any.

* * *

. . . We decline to give any particulars in regard to Request 28; if it is an attempt to get additional witnesses' names, we decline for that reason also.

> THE COURT: . . . I will order the government to give the names of known conspirators not listed.

At no time before the morning of trial were appellants informed that Bland would be a witness for the government. Appellants were notified shortly before trial, and they requested that Bland's testimony be suppressed. When their request was denied, appellants moved for a continuance in order to prepare for their cross-examination of Bland. The court delayed the beginning of the trial until 1:30 p.m. on the same day, but appellants' continuance motion was otherwise denied. Appellants challenge both rulings.

The granting of a bill of particulars is another of the rulings that is within the discretion of the trial judge. *Wong Tai v. United States*, 273 U.S. 77, 47 S.Ct. 300, 71 L.Ed. 545 (1927). Professor Wright has observed that "for practical purposes the trial court's exercise of discretion is almost invariably final." 1 C. Wright, *Federal Practice and Procedure*, §130, at 296 (1969). *See also Tillman v. United States*, 406 F.2d 930, 939 (5th Cir.), *vacated on other grounds*, 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969).

A bill of particulars is a proper procedure for discovering the names of unindicted coconspirators who the government plans to use as witnesses. It is not uncommon for the trial judge to require the government to disclose their names when information is necessary in a defendant's preparation for trial. *Will v. United States*, 389 U.S. 90, 99, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967). The trial court's response to the government's clearly improper failure to comply with such a requirement poses the precise question that now confronts us.

The statement found in *United States v. James*, 495 F.2d 434 (5th Cir.), *cert. denied*, 419 U.S. 899, 95 S.Ct. 181, 42 L.Ed.2d 144 (1974), reflects the position of this court:

> Our distaste for the government's conduct does not, however, warrant a reversal of the case at bar. We have previously held that "an error in administering the discovery rules is not reversible absent a showing that the error was prejudicial to the substantial rights of the defendant."

Id. at 436 (footnote omitted). Our cases have consistently required prejudice to the substantial rights of the defendant before reversing for alleged errors in the administration of discovery. *United States v. Scruggs*, 583 F.2d 238, 242 (5th Cir. 1978). Our opinion in *United States v. Opager*, 589 F.2d 799 (5th Cir. 1979) does not emphasize the requirement of prejudice, but there, as the court found, prejudice was clear. The last two sentences in *Opager* reflect that it is in harmony with the rule stated above:

> It does matter that the Court's orders are obeyed. Noncompliance—coupled with substantial likelihood of injury—visits on the government the consequence of this reversal.

Appellants attempted to make the required showing of specific prejudice. In the Smiths' reply brief they urge that *Bursey v. Weatherford,* 528 F.2d 483 (4th Cir. 1975) recognizes as prejudicial the denial of the opportunity

> (1) to consider whether plea bargaining might be the best course, (2) to do a background check on [the witness] for purposes of cross-examination, and (3) to attempt to counter the devastating impact of eyewitness identification.

Id. at 487. We do not find that appellants brought to our attention that *Bursey v. Weatherford, supra,* has been reversed by the United States Supreme Court. In *Weatherford v. Bursey,* 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977), the Court, speaking through Mr. Justice White, held,

> It does not follow from the prohibition against concealing evidence favorable to the accused that the prosecution must reveal before trial the names of all witnesses who will testify unfavorably. There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one; as the Court wrote recently, "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded. . . ." *Wardius v. Oregon,* 412 U.S. 470, 474, 93 S.Ct. 2208, 2212, 37 L.Ed.2d 82 (1973). *Brady* is not implicated here where the only claim is that the state should

have revealed that it would present the eyewitness testimony of a particular agent against the defendant at trial.

In terms of the defendant's right to a fair trial, the situation is not changed materially by the additional element relied upon by the Court of Appeals, namely, that Weatherford not only concealed his identity but represented he would not be a witness for the prosecution, an assertion that proved to be inaccurate.

* * *

The Court of Appeals suggested that Weatherford's continued duplicity lost Bursey the opportunity to plea bargain. But there is no constitutional right to plea bargain. . . . As for Bursey's claimed disability to counter Weatherford's "devastating" testimony, the disadvantage was no more than exists in any case where the Government presents very damaging evidence that was not anticipated.

Id. at 559-561, 97 S.Ct. at 845.

Appellants particularly complain that because they were surprised they did not have adequate time to prepare for cross-examination. Their argument has obvious weaknesses. It was obvious from the scope of the raid that the government probably had received a great deal of inside information. Counsel concedes that from the beginning appellants suspected that Bland was the government's informer. Bland had been a high-level participant in the operation, but his name was conspicuously absent from the list of the persons indicted.

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Appellants' suspicion of Bland is clearly reflected in their motion for discovery and inspection under Fed.R.Crim.P. 16. They repeatedly inquired as to whether Bland and a James Vaughn would be witnesses for the government.[8] These inquiries

8. The following information was requested in the motion for discovery:

25.

The full and complete statement of all promises, rewards, inducements of any kind made by the Government, its prosecutors, its agencies, or its agents, or by any State acting as a result of an explicit or implicit request by the Government to induce or encourage the giving of testimony or information and made to (a) any prospective witness who the Government intends to call at the trial of the above-captioned matter, (b) any witness who testified to the Grand Jury, (c) or any witness who assisted the Government in its investigation and preparation of the above-captioned matter.

26.

The address where "Dusty" Bland and James Vaughn may be interviewed or, in the alternative, to produce "Dusty" Bond [sic] and James Vaughn for an attempted interview. Defendants believe these witnesses are in protected facilities for housing Government witnesses under Public Law 91-452, Title V, Sections 501-504 [84 Stat. 922], and Defendants believe it essential to attempt such an interview.

* * *

28.

A full and complete statement of any and all criminal cases presently known by the Government to be pending against "Dusty" Bland and James Vaughn, or any other witness the Government intends to call in its case-in-chief at trial of the above-captioned matter; regardless of whether or not these cases are the subject of a promise, reward or inducement.

(Cont'd)

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(Cont'd)

29.

A full and complete statement of any and all criminal conduct which the Government has knowledge has been committed by "Dusty" Bland and James Vaughn, or any other witness the Government intends to call in its case-in-chief, regarding which there has been no conviction, regardless of whether or not these crimes are presently the subject of a promise, reward or inducement and regardless of whether or not these crimes are presently the subject of a pending criminal charge.

* * *

32.

Any written correspondence, documents, or pleadings reflecting the intervention by the Government on behalf of "Dusty" Bland and James Vaughn, or any other Government witness in any civil actions or proceedings, or any State prosecutions.

The government filed the following written responses to these inquiries with the indicated results:

25. The United States has not made any promises, rewards, or inducements of any kind to induce or encourage the giving of testimony or information to (a) any prospective witness who the government intends to call at the trial of the above captioned matter, (b) any witness who testified to the Grand Jury, or (c) any witness who assisted the Government in its investigation and preparation of the above captioned matter. The United States has not requested either explicitly or implicitly any state or subdivision thereof, or any agents, servants or employees of any state or subdivision thereof, to make any promises, rewards, or inducements of any kind to encourage the giving of testimony or information to (a) any prospective witness who the Government intends to call at the trial of the above captioned matter, (b) any witness who testified to the Grand Jury, or (c) any witness who assisted the Government in its investigation and preparation of the above captioned matter.

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(Cont'd) 26. The United States emphatically states that the defendants' belief that *Dusty Bland* and James Vaughn are in protected facilities for housing Government witnesses under Public Law 91-452, Title 5, Sections 501-504 [84 Stat. 922], is completely erroneous. *The United States respectfully declines to state whether or not Dusty Bland* and/or James Vaughn *will be witnesses at the trial of this case.* We respectfully decline to attempt to provide any address of any prospective witness. We respectfully decline to provide a witness list, or portions of a witness list to these defendants. [Emphasis added.]

The court denied appellants' request.

28. *We respectfully decline to provide the information sought in Request No. 28.* The Government does not know of any criminal cases currently pending against *Dusty Bland* and James Vaughn or any other witness which the Government intends to call in its case in chief. [Emphasis added.]

The court denied appellants' request.

29. *We respectfully decline to provide the information sought in Request No. 29.* The defendants will have the opportunity to cross examine any witness utilized by the Government in its case in chief regarding whether or not they have committed any crimes, whether the United States has made any promised, rewards, or inducements to obtain such testimony. Apparently, the defendants believe that certain named persons, *i.e., Dusty Bland* and James Vaughn should have information of value to the United States. We will seek to ascertain whether or not this is true prior to the trial, and if it is true, we will use them as witnesses and give the defendants ample opportunity to cross examine them. [Emphasis added.]

The court denied appellants' request.

32. The United States states that there is no written correspondence, documents, or pleadings reflecting the

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demonstrated the movants' suspection that the government might be protecting Bland and Vaughn and that these two would be government witnesses. The motion did not similarly single out any other potential witnesses by name. It is equally clear that the government was unwilling to disclose in advance of trial whether it would use Bland and that the trial court was not going to require it to do so. The ultimate question being asked was whether Bland would testify for the government. From the totality of discovery responses we may well infer that appellants' suspicions should have been reinforced rather than allayed.

After Bland's name as a government witness was given to appellants, but before trial began, the government disclosed to defense counsel the information it possessed relative to charges pending against Bland.[9] In addition, defense counsel was given

(Cont'd) intervention by the Government on behalf of "Dusty" Bland, and James Vaughn, or any other Government witness in any Civil Action or proceedings or any state prosecutions. We have not intervened.

The court was not required to rule in view of the government's response.

9. The record discloses that the following exchange took place before trial began on October 31, 1977:

MR. GARNER [sic]: Your Honor, in that event I would like to ask for a continuance. I have information that Mr. Bland has been arrested and is currently awaiting trial in Texas on some drug charge. I also have information he was arrested and is currently awaiting trial in Columbus, Georgia on some burglary charge.

* * *

Your Honor, in the burglary charge in Columbus the state has taken an inordinate amount of time to process these cases. In fact, every case I had in Columbus that has

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(Cont'd) been made around the time that Mr. Bland was arrested, or even months after, has been disposed of, and if I would have known Mr. Bland was going to be a witness I would have looked into why they are not prosecuting Mr. Bland in Columbus.

MR. SEGREST: Why don't you call the witness?

MR. GARNER [sic]: Well, I would have investigated.

THE COURT: You have got the time right now, Columbus is only sixty miles from here and the police department can call the police department in Columbus, Georgia, and any one can be here within two hours. Mr. Segrest will go with you now.

* * *

MR. SEGREST: In regard to the rest of the charges now pending against Charles Michael Dusty Bland, I understand that Charles Michael Dusty Bland was arrested in Texas some time in 1977. I do not know when and in what county. He was arrested for carrying a hundred pounds of marijuana or having in his possession a hundred pounds of marijuana. Those charges — he was due to be arraigned on those charges in Texas. At the time he was due to be arraigned he was working for the vice squad of the Columbus police department or had some formal relationship on purely state cases. They called DEA and called and arranged for a continuance of the arraignment. He has not been recontacted by the sheriff in Texas. You can go into that arrest if you want to but I will warn you that he went out there as an agent and servant of Walter Richard Smith, he was going out there for Bobby Smith; so if you want to go into that, live it up. Second thing, since the raid by the United States, and since the affidavit for search warrant got handed to Walter Richard Smith and the co-defendant there have been three charges made against Michael Dusty Bland, one in Harris County, one in Troup County and one in Muscogee County. All three charges are the result of efforts on the part of Walter Richard Smith to

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have him arrested. Now, I am prepared to prove that in at least two instances, one of them was an anonymous telephone call that told about weapons that could be found at his house. I can also state emphatically that the United States has not requested that any law enforcement agency delay charges against Charles Michael Bland, there are no agreements about those charges that are now pending, we have not asked anybody to delay, nor do we know the full details of those charges. Now, if you would like to get them I think I have requested that the police officer, for example, on the charges in Columbus, I have requested that Ricky Boren bring me some data about those charges, and it will be available to you. On the Harris County, I think the Harris County charge I have the sheriff down here. Walter Richard Smith is the informant that gave information about those charges. On the Troup County, I don't know, but I am willing to make anything available that comes to my attention this afternoon or early this evening about those charges, but that is all I know right now. I think Boren has the Muscogee County charge with him. I have asked Jack Wall, who was the person he was working for with the Columbus police department, the vice squad, he is the director of the vice squad, if there had been any agreement or any attempt on their part in his behalf in connection with any of those charges; there have not been. The only intercession by the vice squad of the Columbus police department was through the DEA to a sheriff out in Texas. We do not know at this time whether the charges are pending or not at this time out in Texas, but I do know that if Bland were questioned about that he would testify that he went out there working for Bobby Smith, that he was arrested; the record out there will reflect that Walter Richard Smith, I understand that he really made his bond, but — so you know it is a two-edged sword, but if you go into that I intend to show the source of information. I think it reflects back on this case, but we do not have any agreement and have not attempted to delay those charges in any way.

the opportunity to investigate further, and the help of the Assistant United States Attorney was made available to him.

The transcript of Bland's cross-examination by four defense attorneys consists of forty pages. Their questioning was vigorous and extensive. They tested Bland's direct testimony for weaknesses, attempted to impeach him and attempted to show his bias. They specifically probed whether he had made any deals in connection with his testimony. If more could have been accomplished on cross-examination, it has not been suggested to us.

In a final effort to show specific prejudice appellants contend that they believed at the time of trial that a deal had been made between the government and Bland, but because their motion for continuance was denied, they did not have sufficient opportunity to investigate. Both the government and Bland unequivocally denied having made any deal or even having had any discussions on the subject. No contrary evidence was presented to the trial court by post trial motion. Counsel asserts that he now has discovered such evidence which is submitted as an appendix to appellants' brief. He refers to a telegram and three pieces of correspondence, which apparently demonstrate that in February 1978, three months after trial, the State of Texas withdrew its request that Bland be extradited from the State of Georgia.

Without deciding whether these materials are properly before us we observe that they demonstrate the weakness rather than the strength of appellants' contention. First, the action that these papers reflect could scarcely have been discovered even had the requested continuance been granted. It had not been taken at that time. Second, the papers present information that is neither new nor meaningful. The prosecutor disclosed before trial that according to his information local authorities in

Georgia had intervened with Texas authorities. The suggested line of cross-examination was pursued, but was nonproductive. Whether we consider this new information or not, we are left with nothing more than the defense theory that a deal was made. If appellants have been unable to develop any probative evidence in the fifteen months since the trial court's ruling, they are in a poor position to contend that denial of the requested continuance prevented them from doing so.

It is at least questionable that any additional evidence supporting their theory, even if it had been discovered after trial, would have affected the outcome of this case. In *United States v. Dara,* 429 F.2d 513 (5th Cir. 1970), we held that merely impeaching or cumulative testimony is not sufficient to warrant a new trial based on newly discovered evidence. In view of the compelling evidence of guilt it is difficult to conclude that such evidence, if it exists at all, would be likely to produce a new result. *Ledet v. United States,* 297 F.2d 737 (5th Cir. 1962).

Appellants have failed to show sufficient prejudice to justify reversal on this issue.

III

The Smiths raise two evidentiary issues that require treatment. Bland testified on redirect examination that he made a trip to Texas to pick up 100 pounds of marijuana at the direction of Bobby Smith. A few moments later Bland also testified that Smith was "seeing" Bland's wife. The Smiths first contend that this evidence placed Bobby Smith's character in evidence in violation of Rule 404 of the Federal Rules of Evidence and was not offered to show motive, plan, scheme, intent or identity.

The questioned evidence was allowed only after the defense had cross-examined Bland concerning his prior arrests in Texas

and Georgia and the reason for his decision to talk to the FBI. On redirect the prosecution probed into these matters to develop Bland's testimony that he had been directed to purchase the marijuana by Bobby Smith and had elected to talk to the FBI because of Smith's involvement with his wife.

We find no fault with defense counsel's cross-examination of Bland concerning his arrests. The Supreme Court's holding in *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) is applicable:

> A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." 3A J. Wigmore, Evidence §940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.

Id. at 316-317, 94 S.Ct. at 1110. One of this court's recent statements is more to the point: "An accused is entitled to show by cross-examination that the testimony of a witness may be affected by fear or favor growing out of the disposition of pending criminal matters." *United States v. Brown*, 546 F.2d 166, 169 (5th Cir. 1977). When the witness is the star witness, or was an accomplice or participant, in the crime for which the defendant is being prosecuted, the importance of full cross-examination to disclose possible bias is necessarily increased. *See Beaudine v. United States*, 368 F.2d 417, 424 (5th Cir. 1966).

Bland's cross-examination, however, opened the door to a new line of questioning on redirect. Cross-examination on a part of a transaction enables the opposing party to elicit evidence on redirect examination of the whole transaction at least to the extent that it relates to the same subject. *Harrison v. United States*, 387 F.2d 614 (5th Cir. 1968). We are assisted in our resolution of the present porblem by *Beck v. United States*, 317 F.2d 865 (5th Cir. 1963):

> When the defense opened the question . . . the prosecution was properly allowed to counteract that evidence or rehabilitate the witness, even if in doing so the evidence offered made the defendant appear as an unsavory character. As held in *United States v. Novick*, 2 Cir., 1941, 124 F.2d 107:
>
> > "And if the evidence was proper rebuttal, the fact that incidentally it implied an illegal act on appellant's part would not bar it."
>
> The extent to which counteracting and rehabilitative evidence may be received after the credibility of a witness has been attacked is a matter in which a trial judge has broad discretion. We hold that the trial judge did not abuse his discretion in this case. There was no unfair advantage to the prosecution and no unfair surprise to the defense. *Bank of America National Trust & Sav. Ass'n v. Rocco*, 3 Cir. 1957, 241 F.2d 455.

Id. at 870. In a hearing before trial the Smiths' counsel was specifically warned that if he inquired into Bland's arrests the

prosecutor would bring out the questioned testimony on redirect examination. There was no abuse of discretion by the trial judge, nor any actual prejudice or surprise to the appellants in the admission of this testimony.

IV

A similar analysis can be applied to the Smiths' contention concerning the receipt of two investigative files into evidence. The government introduced a Georgia Bureau of Investigation file on its burglary investigation involving Bland and the Harris County Sheriff's Department file covering the investigation of another burglary allegedly committed by Bland. The Smiths brand the files hearsay evidence that identified Bobby Smith, corroborated Bland's testimony and was not introduced to show bias. The government argues that the evidence was not offered to put Bobby Smith's character in issue, but solely to rebut the arrest testimony brought out during Bland's cross-examination.[10] The government maintains that the files were simply meant to show that the statements that led to Bland's arrests on the burglary charges were made by the Smiths.

These reports were business records kept in the ordinary course of business and, therefore, fit within that exception to the hearsay rule. In *United States v. Halperin*, 441 F.2d 612 (5th Cir. 1971), we recognized that

> Police reports are "business records" under the Business Records Act, Title 28, U.S.C. §1732. *United States v. Martin*, 5 Cir. 1970, 434 F.2d 275; *Bridger v. Union Railway Company*, 6 Cir.

10. Defense counsel were made aware of this testimony in chambers prior to its presentation on the witness stand and were told that such testimony would be elicited if defense counsel chose to impeach Bland with his prior arrests. *See* note 9, *supra*.

> 1966, 355 F.2d 382. The police report need only have been made in the regular course of business and the person offering the report be in a position to attest to its authenticity. With these requisites present, the report is admissible. *Martin, supra; Bridger, supra.*

Id. at 618.

In this case, application of the business record exception was proper to establish that the arrests about which the Smiths cross-examined Bland to show his bias resulted from complaints or statements made by the Smiths themselves. Even if the introduction of these files had been erroneous, it would have been harmless error under the circumstances before us and in light of the overwhelming evidence against the appellants. *See Milton v. Wainwright*, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972); *Schneble v. Florida*, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972); *Harrington v. California*, 395 U.S. 250, 89 S.Ct 1726, 23 L.Ed.2d 284 (1969). We have reviewed the files and conclude that the substantial rights of neither Bobby nor Barbara Smith were adversely affected.

V

Barbara Smith also challenges the sufficiency of the evidence against her. She was convicted both of conspiracy and of conducting a gambling business. The government dismissed the third count charging interstate transportation of gambling equipment as to Mrs. Smith.

Our review of her conviction is controlled by well-established principles. We view the evidence in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 45, 86 L.Ed. 680 (1942); *United States v. Crockett*, 514 F.2d 64 (5th Cir. 1975); *Davis v. United States*, 385 F.2d 919

(5th Cir. 1967). The verdict of guilty must stand if it is supported by substantial evidence taking the view most favorable to the government, without weighing conflicting evidence or testing the credibility of the witnesses, and allowing all reasonable inferences from the evidence in favor of the verdict. *Kroll v. United States*, 433 F.2d 1282 (5th Cir. 1970), *cert. denied*, 402 U.S. 944, 91 S.Ct. 1616, 29 L.Ed.2d 112 (1971).

While no formal agreement or direct evidence is necessary to establish a conspiracy, there must be proof beyond a reasonable doubt that the conspiracy existed, that the accused knew it existed and that with that knowledge the accused voluntarily joined it. *United States v. Gutierrez*, 559 F.2d 1278 (5th Cir. 1977); *United States v. Bright*, 550 F.2d 240 (5th Cir. 1977).

Participation in a criminal conspiracy may be shown by circumstantial evidence. *E.G., Park v. Huff*, 506 F.2d 849 (5th Cir.), *cert. denied*, 423 U.S. 824, 96 S.Ct. 38, 46 L.Ed.2d 40 (1975). Conspiracy is almost always a matter of inferences deduced from the acts of the accused. *Blumenthal v. United States*, 332 U.S. 539, 68 S.Ct. 248, 92 L.Ed. 154 (1947). Whether the evidence is direct or circumstantial, however, the test is whether a reasonably minded jury could find the evidence inconsistent with every hypothesis of innocence. *See, e.g., United States v. Prout*, 526 F.2d 380 (5th Cir.), *cert. denied*, 429 U.S. 840, 97 S.Ct. 114, 50 L.Ed.2d 109 (1976); *United States v. Moore*, 505 F.2d 620 (5th Cir. 1974), *cert. denied*, 421 U.S. 918, 95 S.Ct. 1581, 43 L.Ed.2d 785 (1975).

With these standards, provided by law, we first focus on the evidence of the existence of a conspiracy, the object of which was the operation of a lottery in Columbus, Georgia, and Phenix City, Alabama. The enterprise was of the type frequently referred to as the "numbers racket" or more colloquially as the "bug". A person playing the bug normally selects any

combination of three numerals and makes a bet on the numbers selected. The winning numbers and the odds paid to the winner are determined by preestablished formula. The individual bets are usually rather small.

Charles Michael Bland exposed the inner workings of the operation. He testified that he worked in the lottery operation from July 1975 to January 1977. His testimony verified and tied together the testimony of agents and officers who conducted surveillances and gathered other evidence.

Bland's first job was simply to read the daily lottery tickets to find winning tickets and to identify the "writers" who sold or wrote the winning bug tickets. This was called "finding hits." Later he became more familiar with and involved in the operation when he was assigned the job of tallying the tickets turned in each day by each writer. In this job he totaled or computed the amount of money due from each writer based on the number of bets appearing on the tickets turned in. For each writer he prepared an adding machine tape, a ribbon, that reflected the total amount due.

From February 1, 1976, through January 1977 Bland was a runner, a person who picked up bug tickets from the writers. He testified that he picked up or collected from eleven writers, each of whom he identified in the courtroom.[11] For convenience and to conceal their identity, each writer was given a code initial or number. Bland identified these code numbers and initials and correlated them with the respective writers.[12] The daily pickup

11. The writers were identified as Katie Calhoun, Lillie Belle Griggs, Pauline Crenshaw, Curtis Arrington, Emige Dozier, Willie Battle, Noah B. Frazier, R. B. Moore, Olin Whitaker, Lucille Clark, and Dora Thomas.

12. The code initials or numbers were identified as follows: Katie Calhoun—8-A, Lillie Belle Griggs—2, Pauline Crenshaw—8, Curtis Arrington—C, Emige Dozier—XX, Willie Battle—W.B., Noah B. Frazier—Bob, R. B. Moore—R.B., Olin Whitaker—55, Lucille Clark—44, and Dora Thomas—22.

was usually conducted between 1:30 p.m. and 2:30 p.m. Bland was able to identify the location of each writer. Approximately fifty percent of the writers were located in Phenix City, Alabama, and the other fifty percent, in Columbus, Georgia. Other runners during this period were also identified by Bland.[13]

After the runners had completed their pickups they proceeded to the switch sites,[14] located at the Henry home or the McCoy house. When the tickets had been picked up and the switch made, either Barrentine or Lee took the day's bug tickets directly to the counting house[15] designated for that day.

Bland told of the locations of the different counting houses. Along with Dean Rene Peters and Bobby Joe Lee, Bland was responsible for operating the counting houses. At the counting house each writer's bug tickets were tallied separately, and an individual ribbon identified by code initials or numbers, was prepared. The ribbon showed the total bets from which the writer's commission or percentage, usually twenty percent, was subtracted. The writers were told by telephone the amount of their ribbon for the day. The runners were responsible for collecting the money due from each writer. It was then brought to the counting houses for totaling and for verification against the ribbons. Upon verification the money was taken to either the

13. The other runners were identified as Antonio McCoy, Edna McCoy Hill, and Bobby Joe Lee.

14. At the switch site the pickup men who had received tickets or money from writers turned them over to other participants for delivery to the counting house.

15. At the counting house tabulations and computations were made and winners were identified. The counting houses were identified as Apt. 111 Ansley Apartments, Apt. 706 Salisbury Park Apartments, 304 S. Seal Road, Apartment 9 at 921 Ft. Benning Road, Rudine Edwards house, 209-E Wilson Road, 2039-B 8th Street, 1712 Ridgecrest Road, and sometimes the Smiths' trailer.

Edwards' house[16] or the Smiths' trailer. The Smiths' trailer was located approximately 100 yards behind the Edwards' house. The money was usually taken to the Smiths' trailer and was given to either Bobby Smith or Barbara Smith.

Bland explained that the winning numbers were determined from the Columbus *Ledger & Enquirer,* a daily newspaper published in Columbus, Georgia. The numbers appeared at prescribed places within the New York Stock Exchange quotes. As an example he explained the way in which the winning number was found from the April 6, 1977, *Enquirer.* The last numeral of the winning number was found under the letter "A" in the words "Stock Sales." On this date it was a 3 found on page B-4 of the day's *Enquirer.* The first two numbers were found under the "L" in the words "Bond Sales." In this instance they were 2 and 9. The winning number on April 6, 1977, was determined in this manner to be 293. In the counting house this number was then written on a yellow piece of paper called the tally sheet which was used in finding hits.

After determining the number of winners and the amount of money needed to pay them off, Bland obtained the money to be returned to the writers so that they could pay off the hits. The money was provided from the Smiths' trailer after Dean Rene Peters called the trailer and told the person who answered the telephone the amount needed. This call was made daily between 1:30 and 2:00 a.m.

While working in the operation Bland kept a list of the writers' telephone numbers which he furnished to Special Agent Carroll Payne of the Federal Bureau of Investigation. During his testimony Payne verified that he received the phone numbers of the writers from Bland.

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16. The Edwards house was the home of Bobby Smith's late mother.

Special Agent; R. T. Boren and Richard A. Watson, Columbus Police Department vice squad detectives; and Carroll J. Payne, a Special Agent in the Federal Bureau of Investigation, testified to a series of surveillances in Phenix City, Alabama, and Columbus, Georgia. They identified the runners, switch persons, a few of the writers, the vehicles used, the location of the various counting houses, the routes of various participants, the pattern of bug ticket pickups, and the payoff system. The surveillances were conducted on numerous days between April 15, 1977, and June 16, 1977, and on each day, Monday through Friday.

The government proved that apartments used as counting houses and apparently for no other purpose were rented by various participants in the scheme. Officials of the telephone company in both Phenix City and Columbus provided subscriber names and addresses for the telephone numbers involved. Similarly, testimony of power company employees in those cities established the names in which service to various locations was provided. This testimony pieced together the defendants, the telephone numbers and addresses shown on various exhibits, and the testimony of the officers who conducted the surveillances. In turn that evidence corroborated Bland's testimony in rather meticulous detail.

The searches conducted on June 16, 1977, yielded gambling paraphernalia and materials bearing the fingerprints of several defendants and otherwise linked various coconspirators to the conspiracy.

A gambling expert who had examined the materials seized during the searches testified as a government witness. During his examination he was able to reconstruct the operation of the entire lottery system. He explained the way in which the three digit lottery worked and the odds in such a lottery. He identified the various code designations that appeared on the seized papers

and gambling equipment, which were the same as those previously identified by Bland. On the basis of the seized paraphernalia he was able to calculate that on each day during the week of June 13, 1977, at least $2,000 was bet.

The evidence connected each of the appellants to the operation, identified the location of each writer, described the routes used by the runners, established the location of each counting house, and detailed the procedure used to pick up and pay off the bets. The evidence also indicated the relationship of all appellants and ultimately showed the full extent of their involvement in the conspiracy.

There was circumstantial corroboration of Bland's testimony that places Mrs. Smith at the pinnacle of the operation as a knowing participant. Even without corroboration, this testimony, which the jury apparently believed, was sufficient to convict Mrs. Smith. This circuit has consistently held that even the uncorroborated testimony of an accomplice is sufficient to support a conviction. *United States v. Cabrera,* 447 F.2d 956 (5th Cir. 1971); *United States v. Stanley,* 433 F.2d 637 (5th Cir. 1970). Both circumstantial evidence and direct testimony link Mrs. Smith to the business. A telephone number, ordered or registered in her name, was found on slips of paper carried in the wallets of two coconspirators. The number, 297-5303, was an unlisted number for the telephone service in her trailer. Telephones were located both in the office and in the bedroom of the trailer. The trailer owned by the Smiths was the hub of the operation, and only Bobby and Barbara Smith lived there. The daily receipts were turned over to either Barbara or Bobby Smith. When money was needed to pay off bettors, Peters called telephone number 297-5303, and told whoever answered the phone the amount of money that was needed. This telephone call was ordinarily made in the middle of the night. After the call was made, Bland went to the trailer and got the

money, which was placed between the doors. When picking up the money, he occasionally had conversations with Barbara Smith.

Applying the previously discussed standards governing our review of the conspiracy charge we have no difficulty in concluding that there was at least substantial evidence of Barbara Smith's guilt and that a reasonably minded jury could find the evidence inconsistent with every reasonable hypothesis of innocence.

Barbara Smith was convicted under both the conspiracy count and the substantive count of operating a gambling business. She was sentenced to two concurrent probation terms. In light of our affirmance of her conspiracy conviction, it is not necessary that we review her conviction under the substantive count, since there will be no adverse consequences from application of the concurrent sentence doctrine. *See United States v. Ordoneaux*, 512 F.2d 63 (5th Cir. 1975).

AFFIRMED

APPENDIX B — ORDER OF THE FIFTH CIRCUIT COURT OF APPEALS DENYING PETITION FOR REHEARING AND REHEARING *EN BANC* OF JUNE 18, 1979

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK
July 18, 1979

EDWARD W. WADSWORTH
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, LA. 70130

TO ALL PARTIES LISTED BELOW:
No. 77-5763 — U.S.A. vs. JACK EARL BARRENTINE, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc has also been denied.*

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

cc: Mr. Michael E. Garner
Mr. John A. Nuckolls
Mr. D. Broward Segrest

By s/ Julie Harrison
Deputy Clerk

*As to Appellants, Barrentine, Crenshaw, Griggs, Lee, Barbara Singleton Smith, Peters and Walter Richard Smith, Jr.